Direct Enforcement of Obligations to Do. Two Local Manifestations of the Ius Commune

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Direct Enforcement of Obligations to Do

Two Local Manifestations of the *Ius Commune*

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I. Introduction

There are fundamental differences between the continental legal tradition and the common law tradition as regards the question of whether a creditor is entitled to specific performance or whether he has to content himself with damages. Generally speaking, it could be said that the continental tradition has always seen specific performance as the primary remedy against non-performing debtors, whereas the Anglo-American system sees claiming damages as the primary remedy. Nevertheless, specific performance does play a role in equity, where the courts are certainly competent to award such a claim to the plaintiff.

This does not mean, however, that on the continent specific performance is the proper remedy in all instances. This paper focuses on a rather problematic category, *viz* the enforcement of obligations to perform a certain act. We are dealing here with something the debtor has to do other than convey possession. In the *Corpus iuris civilis* the latter was what the vendor was obligated to perform. It took a single moment of his time and could easily be enforced by the limb of the law, only requiring an ephemeral infringement of his physical integrity. In many jurisdictions nowadays, however, this is quite different. A vendor may be obligated to transfer ownership, not just possession, and transferring ownership may require his cooperation with certain formalities prescribed by law. Most kinds of acting other than just transferring possession imply an active attitude on the part of the debtor. These – labour, services, constructing something, performing a legal act and so on – are more problematical to enforce than the transfer of possession. In all these instances the civilian tradition speaks about *mere factum*, a mere acting, and in all these instances it is hardly conceivable that if the debtor persists in his stubbornness, enforcement can be achieved without infringing on the debtor's physical or mental integrity. Not only does such infringement raise all kinds of practical objections, but it also clashes with the idea that freedom is

an indefeasible right. What determines how the dilemma is resolved? Is it fidelity to the given word or human freedom?
The idea that human freedom has to be observed is not just an idea that emerged at the time of the Enlightenment or as part of the increasing awareness of constitutional rights in the nineteenth century. This principle was already present in the legal doctrines of the Middle Ages. Although it was not observed for the indirect enforcement of monetary debts, *viz* through incarceration, it prevented some jurists from justifying actual enforcement of obligations to do. According to the Italian jurist Dinus de Mugello (1253-1298), who taught at Pistoia, the actual enforcement of an obligation to do would imply a kind of slavery, and that could not be justified. The argument to support this view was found in the Digest, where it was argued that when someone was denied the possibility to depart from where he was, his position resembled that of a slave (D. 43.29.1-2).[1] Bartolus de Saxoferrato (1314-1357) developed a general rule for all contractual obligations to a mere acting, *viz* that they could not be enforced *in specie*, but that the debtor could discharge himself by offering damages since, alongside the obligation to do, a second obligation, *viz* to pay damages, was supposed to have come into existence.[2] The first to phrase this rule as a maxim was the French jurist and magistrate Antoine Favre (1557-1624): nobody can be compelled to act specifically (*nemo precise ad factum cogi potest*).[3]

II. Indirect coercive measures to enforce obligations to do

But what was the practical meaning of this maxim in the early modern period, when reception of Roman law on the continent had taken place? It was hardly ever taken as a rule of substantive law: the creditor was certainly entitled to the act, the debtor obligated himself to perform. Just as in Bartolus' doctrine, the only principal rule acknowledged was that the creditor could not be sentenced to specific performance. Thus, the maxim was limited to procedural law. Occasionally, however, the maxim seemed to be only a rule

1 See for this view of Dinus de Mugello: T. Repgen, *Vertragstreue und Erfüllungszwang in der mittelalterlichen Rechtswissenschaft* Rechts- und Staatswissenschaftliche Veröffentlichungen der Görres-Gesellschaft, NF 73 (Paderborn etc. 1994) p.160-162.

2 J.H. Dondorp, 'Precise cogi. Enforcing specific performance in medieval legal scholarship' in: J. Hallebeek, H. Dondorp (eds), *The Right to Specific Performance. The Historical Development* Ius Commune Europaeum 82 (Antwerp etc. 2010) p. 21-56, at p. 50-52.

3 Antonius Faber, *Rationalia in Pandectas* II (Lyons 1659) ad D. 8.5.6.2 (p. 248): '*Nemo ad factum precise cogi potest, quia sine ui et impressione id fieri non potest, ideoque in obligationibus faciendi succedit praestatio eius quod interest*.'

of execution law: although courts had the competence to sentence debtors to perform *in specie* the act they owed their creditor, ultimately the verdict could not be executed if the debtor persisted in his stubbornness.[4]

We do see in the early modern period that all kinds of indirect coercive measures could be applied with the aim of changing the debtor's mind, so that eventually he would voluntarily perform the act to which he was obliged. Direct enforcement (*praecise cogi*) was not allowed, but indirect enforcement (*civiliter cogi*) was.[5] Many of these measures had their origins beyond the sphere of enforcing contractual obligations to do. Civil custody had its precursors in the Roman incarceration for monetary debts (C. 4.10.12), in the canon law practice of indirectly compelling clerics to adopt an ecclesiastical office (D.74 c.3) or in the *otage* (France) or the *Leisten* (German territories) of indigenous law. Although civil custody was prohibited by the *Reichspolizeiordnung* (title 17 § 10) in 1577, it became the common practice in the Province of Holland.[6] Initially it may have been intended to enforce only monetary debts and contracts of sale, but from seventeenth-century authors such as Simon Groenewegen van der Made (1613-1652) and Simon van Leeuwen (1627-1682) onwards it was assumed that civil custody was generally applicable. In other words, also as a means of indirectly enforcing a certain act the debtor has to perform.[7]

A second indirect coercive measure consisted in imposing monetary fines. These also had their origins in Roman law, *viz* in the *iusiurandum in litem* (D. 12.3.5 and D. 19.2.48.1), which was mostly pronounced in an interlocutory verdict (*pronuntiatio*). This was possible when the claim, an *actio arbitraria*, was based on property rights, aimed at exhibit, or based on a contract of

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4 See for the interpretation of the maxim in the early-modern period: J.H. Dondorp, 'Specific performance: a historical perspective' in: J. Smits et al. (eds.), *Specific performance in Contract Law: National and other Perspectives* (Antwerp etc. 2008) p. 265-285; J. Hallebeek and Th. Merkel, 'Simon van Groenewegen van der Made on the enforcement of 'obligationes faciendi' in: *The Right to Specific Performance*, p. 81-96.

5 The term was used by Ulric Huber (1636-1694) in his *Praelectionum juris civilis tomi tres* (III. 16 no. 6). See also K. Nehlsen-von Stryk, 'Grenzen des Rechtszwangs: zur Geschichte der Naturalvollstreckung' *Archiv für die civilistische Praxis* 193 (1993) p. 529-554, at p. 547-548.

6 See: *Ampliatie van de Instructie van den Hove van Holland*, art. 14 (21 December 1579) in: C. Cau, *Groot Placaet-boeck* II ('s-Gravenhage 1664) p. 770; *Ordonnantie van de Iustitie in den steden en ten platten lande van Holland*, art. 31 (1 April 1580) in: Cau *GPB* II, p. 702-703) and *Instructie van de Hoge Raad*, art. 275 (31 May 1582) in: Cau *GPB* II, p. 833-834.

7 In the nineteenth-century codifications, however, civil imprisonment was mostly allowed in only a restricted number of specific cases.

good faith.[8] The procedural ordinance of the *Reichskammergericht* from 1555 acknowledged the possibility of imposing fines in order to enforce a sentence to perform a certain act.[9] Although civil custody and monetary fines may have been the most important indirect means of enforcing a condemning verdict, there were certainly more of such means having their origins in the Middle Ages, including the billeting of soldiers or court clerks in the debtor's home or the taking of pledges.

III. A historical and comparative diptych: direct enforcement of obligations to do

More problematic, however, is the direct enforcement of a mere act. Not only will this encounter all kinds of practical difficulties, the main objection to such enforcement is that it is inconceivable without a serious violation of the debtor's freedom through an infringement of his physical and mental integrity. It could be argued that the continental legal tradition also accepted the use of armed force (*manu militari*) as a means of enforcing property rights and sale contracts. However, these forms of enforcement required the use of force for only a single moment in order to reach the desired aim, whereas enforcement of, for example, a labour contract from an unwilling employee is not possible without a continuous application of force. Moreover, enforcement of property rights and sale contracts only requires the defendant to tolerate the enforcement, not to actively cooperate, as is the case in all obligations where the debtor has to perform a certain act.

Nevertheless we can identify certain instances in the continental legal tradition where direct enforcement was justified. Two such instances are discussed below in order to answer the question of what justified infringement of the debtor's integrity. These cases involve a more practical and locally embedded manifestation of the *ius commune*, fitting in with the nature of this volume on local legal history, which is dedicated to my former colleague Paul van Peteghem. We can also ask ourselves whether these two instances are examples of a more extensive category of obligations to do, where direct

8 See: H. Lange, *Schadensersatz und Privatstrafe in der mittelalterlichen Rechtstheorie* Forschungen zur neueren Privatrechtsgeschichte 2 (Münster and Cologne 1955) p. 83-84.

9 Reichskammergerichtsordnung 3. XLVIII *Von execution und volnziehung der urtheyl.* Cf. A. Laufs (ed.), *Die Reichskammergerichtsordnung von 1555* Quellen und Forschungen zur höchsten Gerichtsbarkeit im Alten Reich 3 (Cologne etc. 1976) p. 264 ff. The *astreinte* we are familiar with nowadays, however, i.e. the pecuniary fine to be paid to the creditor and accruing for each day of non-compliance, has its origins in late nineteenth-century French case law.

coercive measures were considered justified, or whether, by contrast, they should be regarded as atypical solutions for a limited number of atypical cases and deviating from what was supposed to be the principal rule.

(a) The copyist

The first instance involves a situation where a debtor was physically forced to perform. It was recorded by the thirteenth-century jurist Odofredus († 1265). In his Lecture on the Justinian Code, he described the outcome of an enquiry by the 'old doctors' of Bologna, who had gathered in the Church of St Peter to be heard on a certain matter.[10] The situation under dispute involved a contract of work between a scholar and a copyist. The copyist had obligated himself to work for a full year and to perform the work personally. In other words, with his own hands. Although the general rule, based on D. 42.1.13.1, D. 3.3.45pr and D. 45.1.59, was that no-one could be compelled to perform an act *in specie*, it was decided in this specific case that this rule should be set aside. The copyist could not discharge himself by paying damages, nor by having the work performed by a substitute. The main reason for this would be that another copyist would not have the same handwriting. Odofredus rephrased the decision of the 'old doctors' and the reasoning behind it, without mentioning the specific and explicit commitment of the copyist to perform the work personally. He simply stated that hardly anyone could be found who was capable of finishing the job without a noticeable difference in handwriting. In other contracts of work, however, it did not matter so much if the work was performed by another person. The work of one bricklayer could hardly be discerned from that of another bricklayer, but this could not be said for a copyist because hardly any man or any hand could continue the original copyist's work in a similar way.

Since it was decided to set aside the principal rule in this case, the copyist could be put in foot-shackles (*compedes*).[11] It may be questioned whether the application of such means points towards the usual detention or incarceration as a form of civil custody for monetary debts as the text does not refer to incarceration or anything similar. It is more likely that the copyist was chained to his desk to force him to finish the work. Other medieval sources confirm that it was not unusual to put unwilling copyists in irons at their master's home until the work was finished. According to the *Speculum iudiciale* of Wilhelm Durand (ca. 1230-1296), this was in any event a generally ac-

10 This wording 'old doctors' may refer to previous generations of Bolognese scholars, probably from the early thirteenth century.

11 Ad 4.65.22, see: Odofredus, *Lectura super Codice* I, (Lyons 1552 (reprint Bologna 1968)) f. 259ra.-b.

cepted and customary measure when it was agreed upon that the copyist would remain in his master's home until the work was completed.[12] A fourteenth-century chartulary, the *Codex Dunensis*, contains a document recording the contract between an English copyist, established in Orleans, and a friar named Leonis (possibly a Jean le Lion from around 1268). The copyist had taken it upon himself to copy the apparatus of Innocent on the Decretals and not to accept any other work until this assignment was completed. He also agreed that if he were in any way not to fulfil his duty, he would endure captivity in his master's home, be put in irons and not leave the house until the work was completely finished.[13] Although this contract contains specific clauses that are lacking in the writings of most of the learned jurists, it indicates once again that the use of foot-shackles was not unusual as a direct coercive measure to be applied to unwilling copyists. Guillaume de Cunh († 1335), Professor of Civil Law at Toulouse, stated more generally that if a debtor had to perform work requiring his personal effort, he was not entitled to discharge himself by assigning his assets, but should be put in foot-shackles until the work was finished.[14]

Unlike civil custody this measure is not directed at changing the copyist's will so that he will perform the work voluntarily, but consists in physical pressure to directly enforce performance. The copyist will not be released in order to perform his obligation. On the contrary, in order for the copyist to be released, the work must first be completed. In other words, the issue here involves direct enforcement of an obligation to do by an infringement of the debtor's physical integrity.

Odofredus also referred in his Lecture on the Digest to the decision of the 'old doctors', which is said here to have been taken unanimously. The unwilling copyist could be put in fetters if he obligated himself to produce a work which, from the beginning, would be monomorphic (*opus continue, ut incepit*) and to perform the work with his own hands. It was also emphasized

12 See: Wilhelm Durantis, *Speculum iudiciale* (Basle 1574 (reprint Aalen 1975)) lib. II, partic. II, *De renunciatione et conclusione* no. 29 (tom. I, p. 760): '*In scriptoribus autem ualere potest, si conueniant, ut debeant in certo loco stare, uel scribere, quo casu etiam in compedibus poterunt retineri. Et idem in obsidibus, ut extra de iureiur. Ex rescripto* (X 2.24.9), *propter consuetudinem generalem secundum Vber*[*tum de Bobbio*]'. The examples are discussed more fully by Frank Soetermeer in a paper, the title of which nevertheless suggests that the examples involved a form of civil detention. See: F.P.W. Soetermeer, 'La carcerazione del copista' *Rivista internazionale di diritto comune* 6 (1995) p. 153-189, at p. 180-181.

13 J.B.M.C. Kervyn de Lettenhove (ed.), *Codex Dunensis sive Diplomatum et chartarum Medii Aevi amplissima collectio* (Brussels 1875) no. 133 (p. 216).

14 *Lectura Codicis* (Lyons 1513 (reprint Bologna 1968)) ad C. 7.71 (f. 93ra.): '*Item dico quod debet poni iste in compedibus donec factum quod promisit compleuerit*'.

once again that this decision applied only to copyists and not to other craftsmen.[15] Although it remains somewhat unclear as to whether the promise to perform the work personally was a necessary requirement for setting the principal rule aside, in the case of such a promise it was anyway more justified to chain the copyist.[16]

Whereas Odofredus finds justification for compelling a copyist directly to perform the work he took upon himself in the fact that no handwriting is the same and the copyist cannot simply be replaced by another copyist, later jurists seem to search for justification in the public interest. This can be seen in the gloss *siue* ad D. 39.1.21.4, which was probably added to the Ordinary Gloss at a later stage.[17] Two reasons for justifying enforcing the performance are mentioned, *viz* firstly that the public interest, i.e. the study of jurisprudence, should not be disrupted, and secondly that the magistrate's edict should not be disparaged.[18] Similarly, Guillaume de Cunh stated that if someone had to copy a book, the public interest was at stake.[19] Such an approach seems to have become the prevailing view until influential commentators, such as Baldus de Ubaldis (1327-1400), following Dinus de Mugello, once again made a stand for attaching greater importance to human freedom.

(b) The fiancé

The second example stems from the Roman-Dutch Law of the seventeenth and eighteenth centuries. This time the obligation to be enforced results from the betrothal obligating the fiancé to enter into a marriage with his intended wife. In the Protestant Northern Netherlands matrimony was no longer seen as a sacrament and the secular authorities claimed superior jurisdiction in matrimonial affairs. The legacy of catholic, medieval canon law was nevertheless still present, as appears from the references to pre-reformation canon law and to authors from the Southern Netherlands, where canon law was

15 Ad D. 39.1.21.4, see: Odofredus, *Lectura super Digesto novo*, f. 11rb.-11va.

16 Ad D. 42.1.13.1, see: Odofredus, *Lectura super Digesto novo*, f. 78vb.

17 According to Frank Soetermeer ('La carcerazione del copista', p. 174-175) it is an addition by Accursius' son Cervotto (ca. 1240-1287).

18 The gloss *siue* ad D. 39.1.21.4: '*Ex hac littera collige argumentum, quod scriptor potest cogi precise ad scribendum et poni in compedibus, uel tenetur ad interesse, si hoc placet scholari, arg. quod met. cau. Si cum excep. § Perinde* (D. 4.2.14.9 i.f.) *et ita concordant omnes doctores Bononie residentes. Et est ratio, ne turbetur publica utilitas, id est studium, et hic ne contemnatur edictum praetoris*.'

19 *Lectura Codicis*, ad C. 7.71 (fol. 93ra.): '*quando quis debet facere librum, tractatur de utilitate publica*'.

still applied.[20] However, the title on betrothals and marriages in the *Liber Extra* (*De sponsalibus et matrimonio*) contained an antinomy. Whereas the decretal *Ex litteris* (X 4.1.10) seemed to state that a betrothal could (indirectly) be enforced, the decretals *Praeterea* (X 4.1.2) and *Requisiuit* (X 4.1.17) seemed to indicate the opposite.

The canonists of the sixteenth century had defended divergent solutions in their interpretation of these texts. In one of his *consilia*, Nicolaas Everaerts (1462-1532), once president of the Court of Holland, defended the traditional majority stance. Even if a betrothal was not confirmed by oath, the fiancé may be compelled by ecclesiastical sanctions (*censura*) to fulfil the matrimonial formalities, unless there was a ponderous reason not to do so. He referred in support of this view to Hostiensis (Henricus de Segusio, † 1271) and Panorminatus (Nicolaus de Tudeschis, 1386-1445). He did not consider the decretal *Requisiuit* to be a counter-argument because it applied to situations where there was a ponderous reason for not using coercive measures. Although every marriage required the free consent of both partners, this requirement excluded only external (*extrinsecus*) and not internal (*intrinsecus*) coercion.[21]

The majority stance was on occasions questioned. In Castile, Diego de Covaruvias y Leyva (1512-1577) and Domingo de Soto (1494-1560) were of the opinion that the unwilling fiancé should be admonished, but that ecclesiastical sanctions should not be applied since these would prevent the free consent that was required for every valid marriage.[22] A harmonizing interpretation of the antinomy between X 4.1.10 and X 4.1.17 was presented by the Spanish Jesuit Thomas Sanchez (1550-1610). The unwilling fiancé should be compelled to enter into the marriage only if this would not cause any kind of serious evil or scandal (*gravia mala et scandala*), such as continual dissent and slanging matches between the spouses or result in the man leaving his wife. Thus enforcement was possible, unless a sound reason would render this in-

20 On the influence of catholic canon law on the secural matrimonial law in the Northern Netherlands see: J. Witte, 'The plight of canon law in the early Dutch Republic' in: R.H. Helmholz (ed.), *Canon law in protestant lands* Comparative studies in continental and Anglo-American legal history 11 (Berlin 1992) p. 135-164, at p. 160-163.

21 Nicolaus Everardus, *Consilia sive responsa* (Arnhem 1642) consilium 178, no. 7 (p. 645).

22 For an overview of the various arguments see Ioannes Gutierrez, *De iuramento confirmatorio et aliis in iure variis resolutionibus* (Antwerp 1618) pars I, cap. 51, no. 4 (p. 171-172).

convenient.[23] Paul van Christynen (1553-1631) followed this view in his record of the case law of the Great Council of Malines (1626).[24]

Antonio Perez (1583-1672), who lectured at Louvain, compared betrothal with other contracts. He claimed that non-compliance with the agreement justified legal remedies in view of the damage inflicted. A man could not withdraw from a betrothal without serious prejudice to his future wife and injury to her family. Here the maxim applied that nobody was allowed to change his intention to the prejudice of another (*mutare consilium quis non potest in alterius detrimentum*, VI 5.13.33).[25]

The Protestant Roman-Dutch jurists shared the majority view amongst the canonists that betrothals should be enforced. In his treatise on Roman provisions that were abrogated Simon Groenewegen van der Made, secretary of the city of Delft, taught that the rule of C. 5.1.1, whereby a betrothal was not binding and could be renounced, should be regarded as no longer in force. Although the Romans may have observed this rule against the background of their freedom of divorce, marriage in Groenewegen's own days was indissoluble and, accordingly, betrothals were binding, even if this implied that a fiancé had to enter into matrimony against his will. Betrothal was put on a par with contracts of good faith, which cannot be withdrawn from unilaterally.[26]

Until now, only indirect coercive means were used to enforce the betrothal. The canon lawyers always referred to ecclesiastical sanctions, while Groenewegen spoke about incarceration. When, however, the eighteenth-century Utrecht Professor Jacobus Voorda (1698-1768) described the enforcement of betrothals in the legal practice of his day, he stated that courts were competent to solemnly pronounce a marriage to be concluded or to have their clerk represent the unwilling fiancé and perform the marriage anyway.[27] This implies that over the course of time it had apparently also become accepted to

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23 Thomas Sanchez, *Disputationum de sancto matrimonii sacramento tomi tres*, Antwerp 1607, Liber I, disp. 29, no. 4 (Vol. I, 67-68).

24 Paulus Christinaeus, *Practicarum quaestionum rerumque in supremis Belgarum curiis actarum et observatarum decisiones* Vol. II and III, Antwerp 1626, Vol. III, decis. 124, no. 44 (567).

25 Antonius Perezus, *Praelectiones in duodecim libros codicis Justiniani*, Tomus I, Antwerp-Amsterdam 1645, ad C. 5.1, no. 11 (352).

26 S. Groenewegen van der Made, *Tractatus de legibus abrogatis et inusitatis in Hollandia vicinisque regionibus* III, B. Beinart, M.L. Hewett (eds.) (Johannesburg 1984) ad C. 5.1.1.1 (p. 233).

27 Jacobus Voorda, *Dictata ad ius hodiernum* I-II, M.L. Hewett (ed.) (Amsterdam 2005) ad D. 23.1 (p. 850-852). Such a thing was not accepted in the law of Guelders. See Johannes Schrassert, *Practicae observations* I (Harderwijk 1736) observatio 229 (p. 355-356).

use direct coercion as a means of enforcing betrothals. There are two premises that made such a thing possible. The first is that the fiancé's physical presence was no longer required to conclude the marriage. As the Roman-Dutch jurist Simon van Leeuwen explained, Roman law, canon law and customary law allowed a marriage to be concluded by letter or by a representative. A messenger specifically commissioned for the purpose could, for example, fulfil the matrimonial formalities in the presence of the church, the court or even an officer of the Dutch East India Company (VOC).[28] The second premise consisted in the idea, defended by the Protestant jurist Benedikt Carpzov (1595-1666), that consent could be based on the authority of the court. Accordingly, a judicial sentence could supply the agreement lacking between the intended spouses. It should be noted, however, that Carpzov was speaking here about the absence of parental consent for the marriage of children, not about an unwilling fiancé. As far as means of compelling the latter were concerned Carpzov only mentioned admonition, detention and allocating the fiancé's assets to his future wife.[29]

The competence of the court to pronounce a marriage to be concluded is described at length in a monograph on matrimonial law that was written in Amsterdam around 1665 by one Hendrik Brouwer. The exposé starts with a quotation from the Stoic philosopher Epictetus (ca. 50 - ca. 120 AD) to the effect that no-one can deprive another of his will (Golden Sayings 83) and by stating that no marriage can be concluded without free consent. Subsequently, however, coercive measures are referred to. Firstly there are two indirect measures, *viz* civil detention and allocation of the man's assets to his future wife so that these will support her in conformity with the capacity and dignity of the sentenced defendant (with a reference to D. 37.9.1.19). If even then the fiancé is not prepared to enter the marriage, there is scope for direct coercion. The judge has the competence to declare the claiming maiden and the present or absent defendant to be married and any offspring to be legitimated.[30] Such a far-reaching measure was justified by stating that just as the body of a free person cannot be monetarily assessed, neither could the hope for a happy and harmonious marriage be assessed in coins, while taking nuptial vows was an easy task, at least if the promisor was prepared to do

28 Simon van Leeuwen, *Censura Forensis* (Leiden 1662) lib. I, cap. 14, no. 8 (p. 80): '*Et meo tempore in Societatis Indiae Orientalis ministro, cui hic per procuratorem uxor, eique maritus absens matrimonio juncti fuere, factitatum et admissum memini*'.

29 Benedictus Carpzov, *Opus definitionum ecclesiasticum seu consistorialium* (Leipzig 1685) lib. II, tit. III, definit. 53, nos. 14-15 (p. 81), tit. VIII, definit. 135, no. 12 (p. 205) and definit. 136 , no. 2-12 (p. 207-208).

30 Henricus Brouwer, *De iure connubiorum libri duo* (Delft 1714) lib. I, cap. 24, no. 23 (p. 255).

so.[31] The same approach can be found in the commentary on the Digest by the Utrecht Professor Johannes Voet (1647-1713). The dilatory or hesitant fiancé could be exhorted by the magistrate and put into civil detention. Moreover, if desired, the magistrate could solemnly declare him to be married or order the marriage to be concluded by a civil servant (*apparitor*) representing the fiancé. Voet also shared Brouwer's opinion that a judicial decree could replace the debtor's consent and that the nature of betrothal prevented it from being monetarily assessed.[32]

As Voorda taught in his lectures on contemporary law, this was the common legal practice in eighteenth-century Holland. Nevertheless this practice was destined to disappear in the nineteenth century, when Dutch family law adopted an entirely secularized matrimonial law from the French *Code civil* and, as a consequence, marriage lost its sanctity and was no longer regarded as indissoluble. At the same time it was increasingly considered unacceptable to declare people to be married against their will.

IV. Conclusions

In summary, we have seen two examples of direct coercive measures being used in order to enforce performance of a certain act by the debtor. Chaining the copyist to his desk until the work was finished implied an infringement of the debtor's physical integrity, while completely ignoring the will of a fiancé by declaring him to be married implied an infringement of the debtor's mental integrity: the act is performed on his behalf, but against his will. We have seen that both coercive measures were apparently accepted throughout a certain period in the development of the continental legal tradition, but as exceptions to the principal rule that no-one could be compelled to perform a certain act. Moreover, specific justification was given in both instances. Chaining the copyist to his desk was justified by the public interest that had to prevail, while declaring the fiancé to be married was justified by the sanctity and indissolubleness of matrimony and the very nature of the obligation, implying that damages could not make good the prejudice of a cancelled marriage. Both measures were destined to disappear, just as they once emerged, and in both instances it was the awareness of human freedom or, in

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31 Ibidem, no. 22 (p. 254-255): '*Jam autem non recipit aestimationem liberum corpus, nec felix concorsque speratum matrimonium nummis aestimari potest: at in matrimonio corpora simulque et animi traduntur et praestatio nuptiarum promissarum, modo uelit sponsor, facilis est*'.

32 Johannes Voet, *Commentarius ad pandectas* II (The Hague 1704) ad D. 23.1, no. 12 (p. 6-7).

the nineteenth century, the awareness of constitutional rights that eventually prevailed over the duty to live up to one's promise.

Looking back over the developments in the continental law of obligations since the reception of Roman law, there are not many other examples of direct coercive measures aimed at obtaining the debtor's performance of a certain act. Some can be found in the nineteenth century. We can find an example of a direct coercive measure implying an infringement of the debtor's physical integrity in the mercantile law of some jurisdictions: signed up sailors could be brought aboard with the limb of the law (or the *Seemannsamt*),[33] while an example of a direct coercive measure implying an infringement of the debtor's mental integrity can be found in the enforcement of contracts to sell registrable property. Here the debtor's assistance in drawing up the notarial instrument of delivery could be replaced by a judicial decree that ignored the vendor's resistance.[34] Both these measures also subsequently disappeared as a result of an increasing awareness of constitutional rights. Thus, we may conclude that eventually the appraisal between fidelity to the given word and human freedom, worked out – at least for obligations to perform a positive act – in favour of the latter, while our conclusion in the exceptional instance in which this was not the case should indeed be that this was an atypical solution for an atypical case.

33 See the Dutch *Wetboek van Koophandel* (1838) art. 402 (old) and the German *Seemannsordnung* (1872) § 29.

34 On only one occasion did a Dutch court rule that judicial authorization could take the place of an instrument of conveyance, *viz* in a judgement of the District Court of Rotterdam in 1896 (*W*. 6862). This decision was rejected both in appeal (*W*. 7076) and in cassation (*W*. 7302).